STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 23, 2005
v	No. 250932 Oakland Circuit Court
WAYNE ROY HONSINGER, Defendant-Appellant.	LC No. 02-187997-FH

Before: Saad, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84, and was sentenced as a fourth habitual offender, MCL 769.12, to serve a term of 12 ½ to 25 years' imprisonment. Defendant appeals as of right. We affirm.

I. Competency and Criminal Responsibility

Defendant first argues that the trial court erred in finding him competent to stand trial, and in failing to consider or otherwise make findings regarding his criminal responsibility. We disagree.

A criminal defendant is presumed competent to stand trial absent a showing that "he is incapable because of his mental condition of understanding the nature and object of the proceedings against him or of assisting in his defense in a rational manner." MCL 330.2020(1). Moreover, where legal insanity is not advanced as a defense to a criminal charge, a defendant waives any claim that the trial court should have made findings on criminal responsibility. MCL 768.21a; see also *People v Carpenter*, 464 Mich 223, 239; 627 NW2d 276 (2001) ("the insanity defense as established by the Legislature is the sole standard for determining criminal responsibility as it relates to mental illness or retardation").

In this case, defendant was evaluated by a forensic psychologist and determined to be both competent and responsible "for his actions at the time of the alleged offense." Defense counsel stipulated to the competency evaluation and produced no evidence to the contrary. Under such circumstances, the trial court did not abuse its discretion in finding defendant competent to stand trial. *People v Harris*, 185 Mich App 100, 102; 460 NW2d 239 (1990) ("the determination of a defendant's competence is within the trial court's discretion"). Moreover,

because defendant never asserted an insanity defense, it was not necessary for the trial court to consider or otherwise make findings regarding defendant's criminal responsibility. *Carpenter*, *supra*.

II. Charge and Conviction

Defendant also argues that, given the evidence of a domestic relationship between himself and the victim, as well as his clear intoxication, a more appropriate charge in this matter would have been the misdemeanor offense of either domestic or aggravated assault. See MCL 750.81(2) and MCL 750.81a. However, it is well settled that, if supported by the facts, the prosecutor has broad discretion to proceed with criminal charges under any applicable statute. *People v Yeoman*, 218 Mich App 406, 414; 554 NW2d 577 (1996). The crime of assault with intent to do great bodily harm less than murder requires proof of an assault, coupled with a specific intent to inflict great bodily harm. *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). Although defendant is correct that this offense does not account for the domestic relationship between himself and the victim, given the extreme violence associated with the assault at issue here, we do not conclude that the prosecutor abused his discretion by forgoing consideration of such relationship in favor of pursuing a more serious charge. *Yeoman*, *supra*. Moreover, to the extent defendant asserts that his intoxication resulting from the consumption of alcohol was a factor relevant to the specific intent necessary for a conviction of assault with intent to murder, and thus relevant to the prosecutor's charging decision, we note that with the exception of the voluntary consumption of a substance without knowledge of its intoxicating effects, the Legislature abolished voluntary intoxication as a defense in this state. See MCL 768.37; see also *People v Maynor*, 470 Mich 289, 296-297; 683 NW2d 565 (2004). Therefore, because the assault at issue here occurred after the effective date of MCL 768.37, and defendant provided no evidence indicating that his consumption of alcohol was not voluntary and knowing, the resulting intoxication was not relevant to the prosecutor's discretionary charging decision.

For these same reasons, we reject defendant's claims that the trial court erred in failing to convict defendant of the misdemeanor offenses of domestic or aggravated assault, rather than the charged offense of assault with intent to do great bodily harm less than murder. Defendant's argument in this regard is premised on his claim that his voluntary intoxication negated the specific intent necessary for a conviction of assault with intent to do great bodily harm. However, as noted above, in the absence of evidence that his intoxication was not voluntary and knowing, such intoxication was simply not relevant to the determination of his guilt. *Maynor*, *supra*. In any event, we find the evidence presented at trial to be sufficient to support the trial court in finding that defendant did, in fact, possess the specific intent necessary to be convicted of assault with intent to do great bodily harm. At trial, the victim indicated that defendant knocked her to the floor by punching her in the face with a closed fist, then straddled her and continued punching her while he was screaming. The victim estimated that defendant struck her in the face with a closed fist between twenty and thirty times before grabbing her diamond necklace and attempting to strangle her with it, and further testified that defendant ended the

assault only after someone knocked on the door and stated that the police were on their way.[1] Evidence of the injuries suffered by the victim as a result of the assault, including photographs and records of the medical treatment received by the victim immediately after the assault, revealed extensive injuries to the victim, including severe bruising and swelling about the face and neck. Viewed in a light most favorable to the prosecution, see *People v Legg*, 197 Mich App 131, 132; 494 NW2d 797 (1992), such testimony and evidence was sufficient to support a rational trier of fact in concluding that defendant assaulted the victim, and that he did so with the specific intent to cause her great bodily harm.[2] *Id.*

III. Preliminary Examination Testimony

Defendant also argues that the district court erred in refusing to allow the victim to testify at the preliminary examination regarding her personal knowledge of blackouts previously suffered by defendant. However, contrary to defendant's assertion, the testimony excluded was not lay testimony regarding the victim's personal knowledge or opinion of defendant, but rather testimony regarding the physiological effects of an alcohol induced blackout. Because such testimony was outside the scope of testimony properly offered by a lay witness, see MRE 602 and MRE 701, the district court properly excluded the testimony.

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[1] To the extent that defendant asserts that the victim's testimony regarding the assault was inherently incredible, we note that the trial court was free "to believe or disbelieve any witness or any evidence presented in reaching a verdict." *People v Cummings*, 139 Mich App 286, 294; 362 NW2d 252 (1984). Moreover, this Court will defer to the trial court's resolution of factual issues, especially where it involves questions of witness credibility. *People v Cartwright*, 454 Mich 550, 555; 563 NW2d 208 (1997).

[2] In reaching this conclusion, we reject defendant's assertion that his conviction must be reversed because the trial court, in finding that defendant possessed the specific intent to do great bodily harm, indicated that defendant's conduct toward the victim "could [have] certainly caused serious harm to the health and function of the victim's body." Although defendant is correct that a likelihood of serious harm to the "health and function" of a victim's body is not expressly required for a conviction of assault with intent to do great bodily harm, it is not so contrary to the definition of great bodily harm, i.e., a "serious injury of an aggravated nature," as to require reversal of defendant's conviction. *People v Mitchell*, 149 Mich App 36, 39; 385 NW2d 717 (1986); see also MCL 769.26.

We similarly reject defendant's claim that the trial court's statement that it found "defendant's testimony that this was a couch made by [S]atan or something, . . . [to be] completely incorrect," demonstrates that the trial court misunderstood the defense presented at trial. It is apparent from the record that the trial court understood but rejected defendant's argument that he pushed the victim in self-defense and that it was when she fell into the couch that she sustained her injuries. The comment by the trial court was merely an attempt at informing defendant that it found his argument to be highly implausible.

IV. Sentencing

Defendant next contends that he was not given the opportunity to review, explain or refute facts contained in the presentence investigation report, as required by MCR 6.425, and that he is therefore entitled to resentencing. We disagree. The record shows that in response to the trial court's inquiry into the parties' opportunity to review the report, counsel for defendant indicated that he had reviewed the report and found it to be "factually accurate and correct." Counsel thereafter informed the trial court that he sought "no deletions to the report" and would "leave the rest to [defendant.]" However, when later asked by the trial court whether he wished to say "anything," defendant freely raised a number of issues regarding the facts underlying his conviction, but failed to raise any concerns regarding his review, or lack thereof, of the presentence investigation report. Given the statements of defense counsel and the opportunity to speak afforded defendant, we find no record basis for resentencing. See *People v Syakovich*, 182 Mich App 85, 90; 452 NW2d 211 (1989); see also 1989 Staff Comment to MCR 6.425(D).

Citing *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), defendant also argues that he was improperly ordered to pay restitution in an amount that was not proven beyond a reasonable doubt. However, *Blakely* holds only that if a factual finding is used to elevate a sentence above the statutory maximum, due process requires proof of that fact beyond a reasonable doubt. Because there is no statutory maximum for restitution, see MCL 769.1a(2), *Blakely* is inapplicable. See, e.g., *United States v Wooten*, 377 F3d 1134, 1144 n 1 (CA 10, 2004) (holding that neither *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000) nor *Blakely* apply to restitution orders). Moreover, contrary to defendant's assertion, there is no disagreement concerning the amount of restitution owed to the victim in this case. Although the order of restitution provides for an amount greater than that supported by the medical bills provided by the victim, that disparity stems from the consolidation of the instant case with that in which defendant was convicted by plea of driving while intoxicated, and also ordered to pay restitution to the victims of the resulting accident.

Defendant also argues that the sentence imposed by the trial court is disproportionate because it fails to account for his special physical and mental circumstances. However, where a defendant's sentence is within the guidelines' recommended range, a claim that the sentence is disproportionate is outside the limited scope of review provided for by the sentencing guidelines statute. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). Here, defendant's minimum sentence of 12½ years, i.e., 150 months, is within the guidelines' recommended range of 38 to 152 months' imprisonment. Therefore, we may not review the proportionality of defendant's sentence. MCL 769.34(10).

Moreover, to the extent defendant asserts that the trial court erred in scoring defendant's guidelines by considering convictions for which defendant was not represented by counsel, we note that an erroneous score that would not, when corrected, result in a different recommended range does not require resentencing. *People v Houston*, 261 Mich App 463, 473; 683 NW2d 192 (2004). Here, even were we to accept defendant's assertions of erroneously considered convictions *in toto*, the resulting prior record variable score would not alter the sentencing range recommended by the guidelines. Consequently, defendant is not entitled to resentencing.

V. Ineffective Assistance of Counsel

Finally, defendant argues that because his trial counsel failed to object or otherwise raise a number of the issues now raised on appeal, he was denied his right to the effective assistance of counsel. Again, we do not agree. To establish an ineffective assistance of counsel claim, a defendant must show that counsel's performance failed to meet an objective standard of reasonableness and that the deficient performance so prejudiced the defendant that it deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

In light of our prior analysis, defendant was not denied his right to the effective assistance of counsel. Further, trial counsel was not ineffective for failing to object to sentencing by a judge different from that who presided over defendant's trial. "Generally, a defendant should be sentenced by the same judge who presided over the defendant's trial, provided that the judge is reasonably available." *People v Pierce*, 158 Mich App 113, 115; 404 NW2d 230 (1987), Here, the visiting judge who presided over his trial was not reasonably available to sentence defendant because he was no longer assigned to the court. See *People v Van Auker (After Remand)*, 132 Mich App 394, 399; 347 NW2d 466 (1984), rev'd in part on other grounds 419 Mich 918 (1984). Consequently, defense counsel was not ineffective for failing to object to sentencing by another judge.

Affirmed.

/s/ Henry William Saad
/s/ Joel P. Hoekstra
/s/ Jane E. Markey